

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2018
CASE NO. _____

LARRY DEAN DUSENBERY,
PETITIONER,

-vs-

WARDEN ALLENWOOD U.S.P.,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Larry Dean Dusenbery
Petitioner in pro per
Reg. No. 50908-060
P.O. Box 3000
White Deer, PA 17887

QUESTION PRESENTED

- I. SHOULD THIS COURT GRANT CERTIORARI TO RESOLVE THE SPLIT AMONG THE CIRCUITS AS TO WHETHER A FEDERAL PRISONER CAN RAISE A SENTENCING ISSUE UNDER 28 U.S.C. SECTION 2241?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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OPINIONS BELOW

The opinion of the District Court is attached at Appendix 1. The opinion of the United States Court of Appeals for the Third Circuit affirming the District Court is attached at Appendix 2.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on April 24, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

No person... shall be deprived of life, liberty, or property, without due process of law...

STATEMENT OF THE CASE AND FACTS

The issue in this case is whether a federal prisoner can raise a sentencing issue under 28 U.S.C. Section 2241 because the remedy under 28 U.S.C. Section 2255 is "inadequate or ineffective" to test the legality of his sentence. The circuits are split on this issue.

Larry Dean Dusenbery (hereinafter "Petitioner") acting in pro per, has been incarcerated in the Federal Bureau of Prisons for over 32 years based on two non-violent cocaine convictions. He was arrested on April 23, 1986 for possession with intent to distribute one kilogram of cocaine. He entered a plea of guilty and received a 12 year sentence. Before he was released he was reindicted in October 1991 for continuing criminal enterprise. He entered a plea of guilty and received 27 years. He moved to vacate the plea which was granted by the Sixth Circuit Court of Appeals. See United States v. Dusenbery, 1993 WL 393089 (6th Cir. 1993). He was tried by a jury and convicted in June 1994. He took a direct appeal and his conviction was affirmed on June 6, 1996. See United States v. Dusenbery, 1996 WL 306517 (6th Cir. 1996), cert. denied, 117 S.Ct. 375 (1996). He was sentenced to 40 years.

Petitioner then filed a motion to vacate sentence, pursuant to 28 U.S.C. Section 2255. The district court denied the motion, and the Sixth Circuit affirmed. Dusenbery v. United States, 1999 WL 993973 (6th Cir. Oct. 21, 1999), cert. denied, 120 S.Ct. 1445 (1999). After the district court denied Petitioner's first 2255

motion, this Court decided Richardson v. United States, 526 U.S. 813 (1999). In Richardson, this Court held that, in a continuing criminal enterprise (CCE) case, the jury must agree unanimously not only that the defendant committed some "continuing series of violations", but also as to which specific violations make up that continuing series. Petitioner invoked Richardson and asked the Sixth Circuit to authorize him to file a second or successive motion to vacate his sentence, pursuant to 28 U.S.C. Section 2255. The Sixth Circuit granted the motion, authorizing Petitioner to "file a motion to vacate sentence on the ground that his conviction was unconstitutional after Richardson." In re: Larry Dean Dusenbery, No. 00-3286, slip op. at 1 (6th Cir. June 16, 2000).

On October 31, 2000, the district court granted Petitioner's 2255 motion in part, vacating his CCE conviction based on the Richardson issue. Larry Dean Dusenbery v. United States, Case No. 5:00-cv-1781 (Oct. 31, 2000). The district court ordered Petitioner resentenced on the conspiracy count which was reinstated. ^{1/}

On December 11, 2001, the district court sentenced Petitioner to mandatory life without release on the conspiracy count based on an enhancement filed by the government pursuant to 21 U.S.C. Section 851. (Appendix 3).

^{1/} Petitioner was indicted for CCE and conspiracy. After he was convicted at trial the district court "vacated the conspiracy conviction on the ground that it merged into the continuing criminal enterprise conviction." United States v. Dusenbery, 1996 WL 306517 at 1 (6th Cir. June 6, 1996), cert. denied, 519 U.S. 956 (1996); see United States v. Davis, 809 F.2d 1194, 1204 (6th Cir. 1987), cert. denied, 483 U.S. 1007 (1987).

In June 2017, Petitioner moved for a second or successive 2255 motion in the Sixth Circuit based on this Court's recent ruling in Mathis v. United States, 136 S.Ct. 2243 (2016). The motion was denied because Mathis did not announce a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. (Appendix 4). The Sixth Circuit stated Petitioner did not need permission from that court to file a petition under 28 U.S.C. Section 2241 based on Mathis. (See Appendix 4 at 3).

Petitioner thereafter filed a petition pursuant to 28 U.S.C. Section 2241 in the district court where he is incarcerated based on the Mathis decision. Petitioner argued that he is being held illegally because his prior convictions used to enhance his sentence to mandatory life can no longer be used based on the principles of Mathis v. United States. Petitioner argued that if he was incarcerated in the circuit where he was sentenced he would be entitled to be released because the Sixth Circuit allows a 2241 petition to proceed under Mathis. See Hill v. Masters, 836 F.3d 591 (6th Cir. 2016). The district court in the Middle District of Pennsylvania denied the petition. The court stated it was without jurisdiction to rule on the petition because a sentencing claim cannot be raised under 28 U.S.C. Section 2241. Only a claim of actual innocence can be raised in a 2241 petition in the Third Circuit. (See Appendix 1).

Petitioner filed an appeal to the Third Circuit Court of Appeals which affirmed the lower court. (See Appendix 2). Petitioner now moves for certiorari in this Court based on the split in the circuits regarding this issue.

REASON FOR GRANTING THE WRIT

- I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE SPLIT AMONG THE CIRCUITS AS TO WHETHER A FEDERAL PRISONER CAN RAISE A SENTENCING ISSUE UNDER 28 U.S.C. SECTION 2241

Petitioner was enhanced to mandatory life without release based on two prior state convictions. (See Appendix 3). One conviction is an Ohio drug conviction and the other is a Florida state conviction. Petitioner contends that Ohio and Florida state law criminalizes certain substances that are not listed in the Federal Controlled Substances Act, as codified at 21 U.S.C. Section 802. In particular, Petitioner pointed out that state law defines both benzylfentanyl and thenylfentanyl, neither of which appears in 21 U.S.C. Section 802, as schedule 1 controlled substances. The state of Florida and Ohio defines these substances as schedule 1 controlled substances. See United States v. Cohens, 2008 U.S. Dist. LEXIS 62542, footnote 3 (D. Conn. 2008). In addition to these two substances, there are several other substances in both Ohio and Florida that do not appear in 21 U.S.C. Section 802. As a consequence, Petitioner could have been convicted under these two Florida and Ohio criminal statutes for conduct that does not qualify as a

predicate offense under 21 U.S.C. Section 851(b)(1), and 804 (44). Thus, because state law criminalizes conduct that does not fall within the federal definition of "felony drug offense," the court, pursuant to the principles of Mathis v. United States, 136 S.Ct. 2243 (2016), cannot determine whether or not Petitioner's prior drug convictions qualify him for an 851 enhancement, and the 851 enhancement should not be applied in this case. See also Mellouli v. Lynch, 135 S.Ct. 1980 (2015).

To determine whether a prior drug conviction qualifies as a felony drug conviction, the court must "use one of two methods of analysis: the categorical approach or the modified categorical approach. The categorical approach focuses solely on the elements of the statute forming the basis of the defendant's conviction. Descamps v. United States, 133 S.Ct. 2276, 2281 (2013). "[T]he modified categorical approach permits sentencing courts to consult a limited class of documents, such as indictments and jury instructions, to determine which alternative formed the basis of the defendant's prior conviction. The court can then do what the categorical approach demands: compare the elements of the crime of conviction (including the alternative element used in the case) with the elements of the generic crime." Descamps, 133 S.Ct. at 2281.

When faced with an "alternatively phrased statute," the first task for the court is "to determine whether its listed items are elements or means." Mathis v. United States, 136 S.Ct. 2243, 2256 (2016). "'Elements' are the 'constituent parts' of a

crime's legal definition—the things the prosecution must prove to sustain a conviction." Id. at 2248. "Means," by contrast, are "different methods of committing one offense." Id. at 2254. If the listed items are "elements," then the court should "review the record materials to discover which of the enumerated alternatives played a part in the defendant's prior conviction, and then compare that element (along with all others) to those of the generic crime." Id. at 2248. But, if instead, they are "means," then the court should apply the categorical approach. Id. at 2253.

Petitioner's prior Ohio conviction is based on a statute that is indivisible. A statute is indivisible if the jury may disagree on the fact at issue yet still convict. See Vera-Valdevinos v. Lynch, 649 Fed. Appx. 597, 589-99, footnote 1 (9th Cir. 2016). Ohio's jury instructions did not require the jury to make a finding of fact regarding the specific substance at issue. Petitioner entered a plea of guilty to aggravated trafficking of a controlled substance. (Appendix 5). The specific substance in question was not at issue. Therefore, Petitioner could have entered a plea for trafficking in Benzylfentanyl or Thenylfentanyl, or another drug which is not listed in the Federal Controlled Substances Act, as codified at 21 U.S.C. Section 802. Moreover, because the statute is indivisible, this conviction cannot be used to enhance Petitioner's sentence pursuant to the principles of Mathis v. United States, 136 S.Ct. 2243 (2016). Also see Mellouli v. Lynch, 135 S.Ct. 1980 (2015); Ohio Revised Code Section 2915.03 (A)(6).

Additionally, under the categorical approach, this Court must presume that the conviction rested upon nothing more than the least of the acts criminalized. See Moncrieffe v. Holder, 133 S.Ct. 1678, 1684 (2013); Mathis, supra. Here, the "least of the acts criminalized" by both Ohio and Florida at the time Petitioner committed the offenses, did not carry more than one year incarceration. (See schedule v controlled substances for Ohio in 1985 and Florida in 1981). In order to be used for enhancement purposes under 28 U.S.C. Section 841, 851, the prior conviction had to be a felony drug conviction that carried more than one year incarceration.

As with Ohio, Florida's jury instructions did not require the jury to make a finding of fact regarding the specific substance at issue when Petitioner was charged in 1981. A statute is indivisible if the jury may disagree on the fact at issue yet still convict. See Vera-Valdevinos v. Lynch, 649 Fed. Appx. 597, 589-99, footnote 1 (9th Cir. 2016). Petitioner was convicted under a general conspiracy statute. See Florida Statutes Section 777.04(3). Because Florida state law criminalizes conduct that does not fall within the federal definition of "felony drug offense," the Court, pursuant to the principles of Mathis, cannot determine whether or not Petitioner's prior drug conviction qualifies him for an 851 enhancement, and the 851 enhancement should not be applied in this case.

In addition to all of the above, the circuits are split on this issue. The Fourth, Sixth, and Seventh Circuits all allow a sentencing issue to be raised under 21 U.S.C. Section

2241. See United States v. Wheeler, 2018 U.S. App. LEXIS 6073 (4th Cir. 2018); Hill v. Masters, 836 F.3d 591 (6th Cir. 2016); Brown v. Caraway, 719 F.3d 583 (7th Cir. 2013). The Eleventh Circuit originally allowed a sentencing claim to be raised under 21 U.S.C. Section 2241, see Bryant v. Warden, FCC Coleman-Medium, 738 F.3d 1253 (11th Cir. 2013), but this decision was overruled by the en banc court. See McCarthan v. Dr. of Goodwill Indus.-Suncoast, 851 F.3d 1076 (11th Cir. 2017). The remaining circuits do not allow a sentencing claim to be raised under 21 U.S.C. Section 2241. They only allow a claim of actual innocence to be raised under 21 U.S.C. Section 2241. See, e.g., Reyes-Requena v. United States, 243 F.3d 893 (5th Cir. 2001) (The Fifth Circuit has, however, held that the saving clause of Section 28 U.S.C. Section 2255(e) "applies to a claim: (i) that is based on a retroactively applicable Supreme Court decision which establishes that the petitioner may have been convicted of a nonexistent offense and (ii) that was foreclosed by circuit law at the time when the claim should have been raised in the petitioner's trial, appeal, or first Section 2255 motion."); Prost v. Anderson, 636 F.3d 578 (10th Cir. 2011)(Gorsuch, J.); Larry Dean Dusenbery v. Warden Allenwood U.S.P., No. 18-1148 (3rd Cir. 2018)(Appendix 2). If Petitioner was incarcerated in the circuit where he was convicted he would be entitled to raise this issue and be released. ^{2/} Several

^{2/} Petitioner was indicted in Cleveland, Ohio. The Sixth Circuit allows a sentencing issue to be raised under 21 U.S.C. Section 2241. See Hill v. Masters, 836 F.3d 591 (6th Cir. 2016).

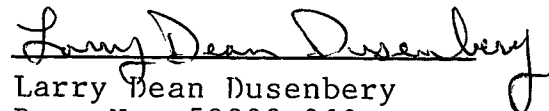
district courts have allowed a sentencing issue to be raised under 21 U.S.C. Section 2241. See e.g., Smith v. Martinez, 2018 U.S. Dist. LEXIS 3766 (Dist. of Ari. 2018).

Petitioner should not have to spend the rest of his life in prison based on the location where he is incarcerated. Therefore, based on the split in the circuits, this Court should grant certiorari.

CONCLUSION

Because of the split in the circuits and the important federal question being raised in this case, the petition for a writ of certiorari should be granted.

Respectfully submitted,

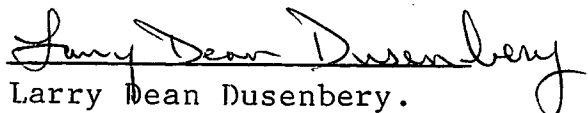


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CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing this 24th day of June, 2018, was served upon the following:

Office of the Solicitor
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20540


Larry Dean Dusenbery.